As stated, there must be further enquiry before the Registrar as to various matters and I understand that the distribution of the two-thirds of the estate to beneficiaries mentioned in clause 8 will necessitate realisation of the respective shares. A scheme should be prepared and submitted which will also include a scheme for realisation and investment of sufficient funds for the purpose of those charitable objects mentioned in the will which I have upheld.

As regards the amounts set aside for objects which I have held to be void or to have lapsed, these amounts will fall into the undisposed residue of the estate for the benefit of the next-of-kin and the enquiry envisaged will include ascertainment of the next-of-kin, accounts of the administration of the estate by the defendant, whether Jainamboo was divorced by the testator during his lifetime and other matters already referred to.

The costs of this application, as between solicitor and client on the higher scale will come out of the estate, and there will be liberty to apply.

Order accordingly.

Solicitors: *Sundram & Khoo; N. Raghavan.*

REX x. CHHUI YI

[C.C.A. (Whitley Ag. C.J., Mills and Adrian Clark JJ.)
April 26, 1936]
[Singapore Criminal Appeal No. 4 of 1936]

Criminal Law — Murder — Alibi — Trial — Summing-up — Comment by Judge on accused's failure to disclose defence at preliminary inquiry — Misdirection — Evidence — Onus of proof — Ordinance No. 53 (Evidence), s.105.

It is open to a trial Judge in a proper case to comment on the fact that the defence of *alibi* had not been disclosed on an earlier occasion.

Where a trial Judge in his summing-up observes that in failing to disclose at the conclusion of the preliminary inquiry names of witnesses whose evidence is likely to support his defence of *alibi*, an accused "cannot expect any help from the police because it is the duty of the police, if he gives the names of witnesses to see that those witnesses are made available for him."

Held: that such observation is not open to objection.

R. v. *Naylor*, (1933) 1 K.B. 685 distinguished.

It is the duty of the Crown to give evidence sufficient, if believed, to prove every ingredient of the offence of which they invite the jury to find the accused guilty but, once that onus is discharged, it remains for the accused to etsablish any facts which may show that what he did is, in his case and as an exception to the general law, not a criminal offence. There can be no legal obligation on the Crown, as a part of its case, to rebut, in advance, all possible grounds of defence.

CRIMINAL APPEAL.

The appellant was tried before Terrell J. and a special jury on a charge of murder and was convicted. He appealed against this conviction.

Taylour for the appellant.
Worley (Solicitor-General) for the Crown.

The questions propounded before the Court of Criminal Appeal (Whitley Ag. C.J., Mills and Adrian Clark JJ.) appear sufficiently from the judgment. The appeal at the conclusion of the hearing was dismissed. The Court intimated that it would reduce its grounds of decision into writing later.

The judgment of the Court was delivered by—

Whitley Ag. C.J.: In this case the Court, at the conclusion of the hearing, dismissed the appeal but announced that, certain of the questions of law raised by Mr. Taylour for the appellant being questions of some importance, the Court would record in writing its decisions in respect of those questions.

The first of these was that which was raised in the appellant's fifth ground of appeal, which reads as follows:—

"The learned Judge's summing up on the question of *alibi* amounted to a mis-direction inasmuch as it tended to suggest that the jury should disbelieve the witnesses [178] called [178] therein by the defence because the names of such witnesses were not disclosed at the preliminary enquiry."

In this connection Mr. Taylour cited to the Court a series of decisions of the Court of Criminal Appeal in England, namely, *R.* v. *Liddle* (in 21 Cr. A.R.); *R.* v. *Brown & Bruce*; *R.* v. *Rabbitt* and *R.* v. *Naylor* (in 23 Cr. A.R.) and *R.* v. *Parker* and *R.* v. *Littleboy* (in 24 Cr. A.R.).

Of these decisions that which, at first sight, is most nearly in favour of the appellant's contention in the present case is *R.* v. *Naylor*. In that case the Court of Criminal Appeal delivered judgment in a form which led the learned Editor of the Reports to summarise the decision, in his headnote, in words implying that it was improper for a trial Judge to make any adverse comments on a prisoner's failure to make any statement, when before the committing Magistrate, explaining where he was and what he was doing at the time of a housebreaking of which he declared himself to be not guilty, and that any such comments would lead to the conviction being quashed. A study of the case of *R.* v. *Naylor*, however, shows that the decision was given on the particular facts of that case and the particular form of the comments there made by the trial Judge. This was pointed out in the later case of *R.* v. *Littleboy* where Lord Hewart L.C.J. (who had also delivered the judgment of the Court in *Naylor's* case) at pp. 196-197 of the report says:—

"The real point urged on behalf of the appellant is that the Judge was wrong in making observations upon the fact that the defence of *alibi* had not been disclosed before the Magistrates, and our attention has been directed to *Naylor*, *supra*. It is important to observe that in that case the fact that the appellant had not disclosed his defence at an earlier date was employed as being evidence against him in corroboration of an alleged accomplice, who had given evidence for the prosecution. It is important to remember that the judgment in that case was given with reference to those facts. It is quite true that there are sentences to be found in the report of that judgment which appear to be of universal application. We do not think, however, that it was ever intended to lay down the proposition that a Judge may not in a proper case comment on the fact that the defence has not been disclosed on an earlier occasion. It is one thing to make an observation with regard to the force of an *alibi*, and to say that it is unfortunate that the defence was not set up at an earlier date so as to afford the opportunity of its being tested; it is another thing to employ that non-disclosure as evidence against an accused person and as corroborating the evidence of an accomplice."

Moreover in the case of *R.* v. *Moran*, (1909) 3 Cr. A.R. at p. 26 the Court took the view that a genuine *alibi* should be set up before the committing Magistrate and in *R.* v. *Rabbitt* (23 Cr. A.R. at p. 115) the Court stated that the fact that an *alibi* was not put in before the trial was "open to criticism."

We think that it is always open to a trial Judge to comment on the circumstances in which an *alibi* is first set up so long as that comment is couched in language that is moderate and fair.

In the present case the passage in the summing-up of the learned trial Judge to which exception has been taken reads as follows:—

"Then there is the question as to his defence. He has given evidence on oath, and he has called witnesses in support of it, and you must, of course, give his evidence as much weight as you think fit, and if it throws any doubt on the evidence given by the witnesses for the prosecution, then of course, you must give him the benefit of that doubt if it is a reasonable doubt. But it is true, of course, that an accused person who wishes to put up an *alibi* should in his own interests put it up as soon as possible, and we know that he was unable to give, or refused to give his counsel or the Court any names of witnesses when the preliminary enquiry finished. If his defence was an *alibi* he could have given the names both of Ho Seng and Kong Seng, if, as he says, they both saw him on the crucial date in Johore. And yet he did nothing about that. He is, of course, at liberty to reserve his defence but if he does and says nothing about this defence of an *alibi*, then he cannot expect any help from the police, because it is the duty of the police, if he gives the names of witnesses, to see that those witnesses are made available for him. It is also difficult, after several months, to get people to be certain as to exactly what happened on a particular date, while if the evidence is called immediately it is all the more valuable."

Mr. Taylour invited this Court to read into that passage some innuendo that the *alibi* was obviously false and that the accused was *ipso facto* guilty. The comments of the learned trial Judge will bear no such innuendo. They were eminently fair and unobjectionable, and this ground of appeal must fail.

[179] [179] The next question was that which was raised in the seventh ground of appeal, which alleged that certain parts of the summing-up of the learned trial Judge constituted a misdirection because he had failed to direct the attention of the jury to the recent decision of the House of Lords in *Woolmington's* case which, it was alleged, had had an "effect" on section 105 of our Evidence Ordinance. It was not very clearly explained how a decision even of the House of Lords could be said to "effect" a statutory provision of our law, but probably what this was intended to mean was that section 105 of our Evidence Ordinance should now be construed in some way different from that in which it has hitherto been construed in our Courts. We do not think the decision of *R.* v. *Woolmington*, [1935] App. Cas. 462 can have any effect on our law. That decision dealt with the Common Law of England and destroyed the theory, which had found place in certain textbooks that, at Common Law, "killing is murder," or, in other words, that, on a charge of murder, it is sufficient for the Crown to establish merely that the deceased died at the prisoner's hands and that thereupon the onus shifts on to the prisoner and he must show circumstances reducing the offence to one of manslaughter or showing the homicide to have been lawful or excusable. The Crown, it has now been laid down, must prove not only the killing but that the killing was intentional and "malicious"; the onus of proving this always remained on the Crown, whether the accused gives evidence or not; and, at the end of the case, the jury must not convict of murder unless those elements of the offence of murder have in their opinion been proved without reasonable doubt. "It is the duty of the prosecution," said the Lord Chancellor, "to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and *subject also to any statutory exception.*"

Not only does section 105 provide such a statutory exception but our definition of murder, unlike that in England, is a statutory one. It is laid down, as we all know, in sections 299 and 300 of our Penal Code and these sections make it clear that the prosecution must always prove the existence, in the mind of the accused, of one of the intentions or of the knowledge therein described. We think that, with these sections before him, no Judge of this Colony would ever have given to a jury a direction such as that which led to the quashing of the conviction in *Woolmington's* case.

Section 105 of our Evidence Ordinance in no way lessens the onus which always remains upon the prosecution. All that that section lays down is that:—

"When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances,"

and illustration (b) to that section shows that, *inter alia*, the burden of proving sudden provocation (which would reduce the offence, in accordance with the terms of exception 1 to section 300 of the Penal Code, to one of culpable homicide not amounting to murder) is a burden which is on the accused. This burden, however, can never arise unless the Crown has already produced evidence sufficient in law to satisfy the jury, in the absence of evidence from the defence, that the killing amounted to culpable homicide committed with one of the intentions or with the knowledge described in section 300 of the Penal Code.

The general exceptions referred to in section 105 of the Evidence Ordinance are those contained in Chapter IV (sections 76-106) of the Penal Code, and *Woolmington's* case can be no authority for saying that the onus is always on the Crown of negativing *ab initio* every one of those possible exceptions together with any contained in any other relevant Ordinance; of proving affirmatively in every case, for example, that the accused was acting under no mistake of fact, was over 7 years of age, was not so drunk as to come within sections 85 and 86, was not acting in self-defence, had suffered no provocation, was sane and so forth. It is true that it is the duty of the Crown to put before the Court all relevant evidence which can be given by witnesses whose honesty there is no reason to doubt, and that the evidence thus fully given may, in most cases, in fact tend to disprove many or all of the statutory exceptions. We think it is clear, however, that there can be no legal obligation on the Crown, as part of its case, to rebut, in advance, all possible grounds of defence. The Crown must give evidence sufficient, if believed, to prove every ingredient of the offence of which they invite the jury to find the accused guilty but, that onus discharged, it remains for the accused to establish any facts which

may show that what he did is, in his case and as an exception to the general law, not a criminal offence.

The direction which, in the present case, the learned trial Judge gave to the jury was the following:–

"It is correct, as the learned Deputy Public Prosecutor has told you, that the proof of such a statutory defence is on
[180] the [180] person who sets the defence up, and it is, of course, difficult for a man who sets up an *alibi* to try and prove such a set of circumstances when presumably, he was not there. He is, of course, at liberty to try and prove his case from the evidence which is called for the prosecution."

This direction was in accordance with the law of this Colony and is not open to objection. This ground of appeal, therefore, also fails.

A third question was that which was raised in the eighth ground of appeal, which alleged mis-direction on the question of common intention. This Court recently considered this question in the case of *R.* v. *Banka & Anor.*, [1936] M.L.J. 66, *supra* p. 53, where the terms of section 34 of the Penal Code were summed up in the following phrase: "Under the terms of that section . . . there must exist a common intention to commit the crime actually committed, and it is not sufficient that there should be merely a common intention to 'behave criminally'." That does not, of course, mean that, in the case of murder, there need have been a common intention actually to kill; but there must have been a common intention to do any of the acts which are described in sections 299 and 300 of the Penal Code and the doing of which, if death results, amounts to murder.

The passages in the summing-up which Mr. Taylour has sought to criticise are to be found at pp. 167 and 168 of the shorthand note. Mr. Taylour's criticism was really based on the hypothesis that the deceased may have been the first to use a firearm and that each of the accused and his companions may then have used his pistol as a result of that provocation and not of any pre-conceived design. This hypothesis, however, finds no support in the evidence. There is no evidence that the deceased was armed; all the evidence, on the contrary, supports the view that he was not. The evidence as a whole suggests one thing only and that is a joint unprovoked and murderous attack upon the deceased by the accused and his companions. To borrow a phrase from the judgment of the Court of Criminal Appeal in England, in the recent case of *Rex* v. *Waddingham*, "The argument of counsel for the appellant really amounted to the contention that the Judge, exercising a scientific imagination, ought to have conjectured that the jury might conceivably invent a new case which was not supported by a tittle of evidence."

On the evidence which was before the jury the summing up of the learned trial Judge is not open to any substantial criticism in respect of the points raised by counsel for the appellant. On p. 168 of the shorthand note the word "probably" may be an error in transcribing the shorthand sign for "fired" and one or two of the sentences, as transcribed, are none too clear, but these also may contain errors in reporting due to poor acoustics. We are satisfied that the directions to the jury were substantially correct and should not have misled them in the consideration of their verdict.

This Court dealt with the facts of this case when delivering its oral judgment dismissing the appeal. It was never suggested in argument before us that the acceptance by the jury of the identification of the accused could successfully be attacked; it was only faintly suggested that the jury were wrong in rejecting the *alibi;* and once the evidence of Mr. Shuat and of Osman bin Babji was accepted as being substantially accurate there was ample justification for the unanimous verdict of the jury that the accused was guilty of murder.

Appeal dismissed.

Solicitors: *John G. Campbell & Co.*

MRS. J. A. PEREIRA v. SINGAPORE IMPROVEMENT TRUST

[Special Jurisdiction under Singapore Improvement Ordinance (L. B. Gibson D.J.) May 11, 1936]

[Tribunal Reference No. 1 of 1936]

Singapore Improvement Ordinance, 1927, s.105 — Injurious affection.

A piece of land was injuriously affected by the approval of a plan under section 52 of the Singapore Improvement Ordinance. The owner made no claim for compensation within the time limited by section 105 of the Singapore Improvement Ordinance. More than three years later the Government of the Straits Settlements proceeded to acquire part of the land for the Singapore Improvement Trust for road widening purposes, acting under Ordinance No. 49 (Land Acquisition). Thereupon the owner made a claim not only for the part of the land acquired but also for injurious affection had in fact been suffered at the time of the approval of the plan.

Held: that the right to claim for injurious affection under section 105 of the Singapore Improvement Ordinance had gone and could not be revived. Compensation for injurious affection could now only be claimed under section 25(1)(d) of Ordinance No. 49 if the depreciation of the value of the property consequent upon the acquisition exceeded the amount which could have been claimed under section 105 of the Singapore Improvement Ordinance on the approval of the plan.

Also held: that when land is acquired by the Government for the Singapore Improvement Trust under section 42A of the Singapore Improvement Ordinance the provisions of Ordinance No. 49 apply to the exclusion of section 113 of the Singapore Improvement Ordinance.

Also held: that upon a reference to the Tribunal under section 42A, subsection 3 the reference is as to the [181] whole [181]
question of the compensation payable, not merely as to such part of an award as may have been appealed against.

TRIBUNAL REFERENCE.

On the 16th April, 1932 the Singapore Improvement Trust submitted to the Governor in Council under section 51 of the Singapore Improvement Ordinance a plan prepared by them known as Addition No. 18 of 1931 to the General Improvement Plan of Singapore. The Plan showed a proposed regular line of street for Upper Serangoon Road, Singapore which involved a road widening. Lot 15^{20} of Mukim 22 (containing a total area of 6,254 sq. ft.) abutted on Serangoon Road and was affected by the plan as the front part of the land would be required for road